

DOCKET FILE COPY ORIGINAL
Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
)
Review of the Commission's Rules Regarding)
the Pricing of Unbundled Network Elements) WC Docket No. 03-173
and the Resale of Service by Incumbent Local)
Exchange Carriers)

ORDER

Adopted: May 12, 2004

Released: May 12, 2004

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On March 16, 2004, AT&T Corporation (AT&T) filed a motion requesting that the Commission allow third party discovery in the above-referenced proceeding.¹ Specifically, AT&T requests the Commission to require the four Regional Bell Operating Companies (individually, BellSouth, Qwest, SBC, and Verizon, and collectively, "the Bell Companies") to respond to requests seeking certain data in connection with their comments and proposals in this proceeding.² For the reasons explained below, we deny AT&T's motion.

II. BACKGROUND

2. In the *TELRIC NPRM*, the Commission sought comment on whether the Commission should clarify or modify the current rules applicable to the pricing of interconnection, unbundled network elements (UNEs), and resold telecommunications services.³ The Bell Companies filed comments advocating that the Commission change the pricing rules to better reflect the "actual" costs of "real world" networks.⁴ The Bell Companies argue that such an approach more

¹ AT&T Motion to Require Incumbent Local Exchange Carriers to Respond to Data Requests, WC Docket No. 03-173 (filed March 16, 2004) (Motion).

² Motion at 1-10, Att A-D.

³ See *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Services by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18,945 (2003) (*TELRIC NPRM*). Comments were filed on December 16, 2003 and reply comments were filed on January 30, 2004. See *Comment and Reply Comment Dates for the TELRIC NPRM*, WC Docket No. 03-173, Public Notice, 18 FCC Rcd 21382 (Wireline Competition Bureau, rel. October 20, 2003).

⁴ See, e.g., *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Services by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Comments of BellSouth at 2-4, 9, 14-29, 44-45, 58 (filed Dec. 16, 2003) (BellSouth Comments); Comments of Qwest Communications International Inc. at iv-v, 1, 14-24, 30-43, 47-54 (filed Dec. 16, 2003) (Qwest Comments); Comments of the Verizon Telephone Companies at iv-vi, 1-2, 25-60 (filed Dec. 16, 2003) (Verizon Comments).

accurately measures forward-looking costs than the current TELRIC methodology, better promotes facilities-based competition, and sends the proper economic signals to both incumbent and competitive local exchange carriers.⁵

3. In its motion, AT&T requests that the Commission require the Bell Companies to supplement their comments by responding to AT&T's data requests.⁶ Specifically, AT&T requests that the Bell Companies provide detailed internal data regarding their existing facilities and equipment, actual and planned expenses, short-term and long-term planned upgrades, and network routing.⁷ AT&T contends that the requested data are necessary "to verify a critical assumption of the Bells' comments in this proceeding: that they maintain sufficient internal data from which UNE rates could be determined under the 'more real world' methodologies that they ask the Commission to adopt."⁸

4. AT&T acknowledges that the Commission's rules ordinarily contemplate discovery procedures only in adjudicative proceedings, but it urges the Commission to authorize discovery in this rulemaking proceeding.⁹ AT&T cites prior Commission decisions recognizing the Commission's "broad discretion" to implement such procedures in rulemaking proceedings when doing so will be conducive to "effective and expeditious resolution of the issues."¹⁰ AT&T claims that the Commission needs such information to make a meaningful assessment of the Bell Companies' proposals in this proceeding.¹¹ MCI filed a letter in support of AT&T's Motion, urging the Commission to require the Bell Companies "to produce the data they claim should be the basis of TELRIC pricing proceedings."¹²

5. The Bell Companies oppose the Motion.¹³ They state that the normal rulemaking process will provide the Commission with sufficient information to make an informed decision and that third-party discovery would impose undue burdens on parties and the Commission.¹⁴ SBC, for example, responds that it would not advance the public interest to "deputize AT&T or any other private party" to perform a fact-finding function separate and apart from the

⁵ See, e.g., BellSouth Comments at 9; Qwest Comments at i-ii, 1-6, 15, Verizon Comments at i-iv, 1-24

⁶ See Motion at Att. A-D.

⁷ Motion at Att. A-D.

⁸ Motion at 1, 3

⁹ Motion at 1-2

¹⁰ Motion at 2 (citing *California Water and Telephone Co.*, Docket No. 16928, Memorandum Opinion and Order, 23 FCC2d 840, 843 at para. 7 (1970)).

¹¹ Motion at 4-5

¹² Letter from John R. Delmore, Senior Attorney, Federal Advocacy, MCI, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-173 (April 1, 2004).

¹³ See *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Services by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Opposition of BellSouth Corporation (filed March 26, 2004) (BellSouth Opposition), Response of Qwest Communications International Inc. (filed March 26, 2004) (Qwest Opposition), SBC's Opposition to AT&T Corporation's Discovery Motion (filed March 26, 2004) (SBC Opposition); and Opposition of the Verizon Telephone Companies to AT&T Corporation's Motion to Permit Data Requests (filed March 26, 2004) (Verizon Opposition).

¹⁴ BellSouth Opposition at 1-2, 4, Qwest Opposition at 1-3; SBC Opposition at 1-2, 5-6; Verizon Opposition at 3-4, 10.

Commission's information-gathering process, and suggests that this type of formal discovery is more appropriate in state UNE cost proceedings.¹⁵ Similarly, Verizon cautions that introducing private discovery into the rulemaking process would add complexity and require the Commission to resolve myriad detailed procedural issues.¹⁶ BellSouth asserts that AT&T's request is premature because a methodology must be chosen before determining what data must be collected.¹⁷ Qwest likewise contends that AT&T's request is inappropriate given that the proceeding is still at an early stage.¹⁸ Both Qwest and Verizon assert that the requested data are unnecessary to evaluate their proposed modifications to the current pricing methodology.¹⁹

6. AT&T filed a Reply reiterating that the Commission cannot make an informed judgment without the information sought in its discovery requests.²⁰ AT&T emphasizes that, although discovery is discretionary, it is warranted in the particular circumstances of this proceeding.²¹ AT&T contends that the pricing approach advocated by the Bell Companies simply cannot be adopted without first verifying whether the Bell Companies have sufficient data regarding actual costs and the "real world" attributes of their existing networks.²²

III. DISCUSSION

7. As explained below, the decision whether to permit discovery in a rulemaking proceeding is entirely within the Commission's discretion. Based on the record compiled in response to AT&T's Motion, we find that it would not be beneficial to permit third party discovery in this rulemaking proceeding. Accordingly, we deny AT&T's Motion.

8. There is no statute or regulation requiring the Commission to permit private discovery in a rulemaking proceeding. The Administrative Procedure Act does not establish any discovery procedures for use in rulemaking proceedings, nor does it provide any right to parties to seek discovery in such proceedings.²³ The Commission's rules likewise do not provide a right to discovery in rulemaking proceedings. In a rulemaking proceeding, interested parties are specifically permitted to participate through "submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner," but there is no provision for any separate third party discovery.²⁴ By contrast, discovery procedures such as

¹⁵ SBC Opposition at 1-2, 9.

¹⁶ Verizon Opposition at 3-4.

¹⁷ BellSouth Opposition at 2.

¹⁸ Qwest Opposition at 1-2.

¹⁹ Qwest Opposition at 3-5; Verizon Opposition at 5-11.

²⁰ *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Services by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Reply of AT&T Corporation to Oppositions of Incumbent Local Exchange Carriers to AT&T's Motion to Require Responses to Data Requests (filed April 7, 2004) (AT&T Reply).

²¹ AT&T Reply at 3.

²² AT&T Reply at 9-10.

²³ See 5 U.S.C. § 553.

²⁴ 47 C.F.R. § 1.415(a).

interrogatories and document production requests are expressly available “in any case of adjudication.”²⁵

9. The Commission, moreover, does not generally exercise its discretion to permit third party discovery in rulemaking proceedings because of the potential for undue delay.²⁶ We agree with the Bell Companies that private discovery has the potential to transform a policy-oriented rulemaking proceeding into an exceedingly litigious battle over procedural issues.²⁷ Such procedural issues – which parties may serve discovery, which parties must respond, the number of requests to permit, the scope of the requests, and the sufficiency of the responses – easily could divert the Commission’s limited resources away from important substantive issues and diminish its ability to complete this proceeding in a timely manner.²⁸

10. We reject AT&T’s contention that discovery “is necessary to ensure a complete record.”²⁹ The Commission’s procedures for gathering factual information in a rulemaking are sufficient to produce disclosure of relevant facts.³⁰ Parties routinely respond to comments opposing their proposals by providing supporting information, and the Commission often works directly with parties to obtain any additional information it needs. These procedures have proven adequate to allow a full investigation of facts just as complex as those presented here. AT&T has not shown why this rulemaking requires different procedures, nor has it shown that this rulemaking is so unique that the Commission could possibly deny discovery in future rulemakings if it allowed discovery here.

11. Our decision to rely on existing procedures, rather than introducing a discovery process, is not intended to suggest any position on any party’s substantive position regarding the TELRIC pricing methodology. We note that the ease of implementing any new pricing methodology is an important consideration for the Commission.³¹ Accordingly, we expect all parties that propose changes to the current methodology to provide the Commission with sufficient data in this proceeding to understand and evaluate their proposed costing methodologies and how these proposals would be implemented.

²⁵ 47 C.F.R. § 1.311(a).

²⁶ See *International Record Carrier's Scope of Operations in the Continental United States, including Possible Revisions to the Formula Prescribed Under Section 222 of the Communications Act*, Docket No. 19660, RM-690, Notice of Inquiry and Further Notice of Proposed Rulemaking, 68 FCC 2nd 1145, 1149, para. 11 (1978) (denying motion to compel the production of evidence in a rulemaking proceeding), see also *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 89-624, Order, 5 FCC Rcd 3533, 3535, para. 30 (1990) (noting that, although discovery was used in the instant rulemaking proceeding, discovery is more commonly used in adjudications).

²⁷ See SBC Opposition at 5.

²⁸ See Verizon Opposition at 3-4.

²⁹ AT&T Reply at 6.

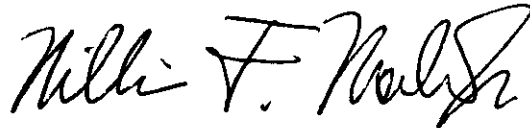
³⁰ See generally *Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Procedures*, Docket No. 16473, Report and Order, 11 FCC2d 185, 187, para. 5 (1968).

³¹ See *TELRIC NPRM*, 18 FCC Rcd at 18948-50, 67-68, paras. 6, 9, and 60.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201, 251-254, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 251-254, and 303(r), and pursuant to the authority delegated by sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, AT&T's Motion to Require Incumbent Local Exchange Carriers to Respond to Data Requests IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "William F. Maher, Jr.", written in a cursive style.

William F. Maher, Jr.
Chief, Wireline Competition Bureau